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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

In Re Bard IVC Filters Products  
Liability Litigation

No. MD-15-02641-PHX-DGC

This Document Relates to:

Debra Tinlin, et al. v.  
C. R. Bard, Inc., et al.  
CV-16-00263-PHX-DGC

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO DEFENDANTS'  
MOTION *IN LIMINE* NO. 3 TO  
EXCLUDE EVIDENCE OF THE CRISIS  
COMMUNICATIONS PLAN**

1 In 2004, Bard retained the public relations firm, Hill & Knowlton (“H&K”), to  
 2 prepare a “Crisis Communication Plan” to implement “an immediate communications  
 3 strategy” to address bad press resulting from the internal investigation of a death related  
 4 to the Recovery filter “and others that may arise.” *See* Doc. 16573-1, at 2. It was  
 5 “intended to prepare for ... product withdrawal and or [sic] general negative stories  
 6 surround Recovery Vena Cava Filters.” Doc. 16573-1, at 3. H&K and Bard together  
 7 created additional documents attached to the Plan’s Appendix, containing information  
 8 about Bard’s Recovery filter.<sup>1</sup> Numerous Bard employees/consultants reviewed, updated,  
 9 and commented on the Crisis Communication Plan as it went through Bard’s corporate  
 10 review process.<sup>2</sup> Bard now seeks to exclude all related evidence. The motion should be  
 11 denied as the evidence is relevant and not unduly prejudicial.

### 12 **ARGUMENT AND CITATION OF AUTHORITIES**

13 First, The Crisis Communication Plan is relevant because it outlines Bard’s  
 14 knowledge of the Recovery filter’s known risks and Bard’s attempt to downplay those  
 15 risks and associated injuries related to the Recovery filter at the outset of marketing. Bard  
 16 nevertheless argues the Crisis Communication Plan was a response to a “cephalad  
 17 migration” not “substantially similar” to Mrs. Tinlin’s injury. Def. Mtn at 2. This is not a  
 18 complete description. This document was intended to prepare for “general negative  
 19 stories surrounding Recovery Vena Filters.” Doc. 16573-1, at 3. The Crisis  
 20 Communication Plan itself is not “evidence of other accidents” used as “direct proof of  
 21 negligence, a design defect, or notice of the defect.” *See Cooper v. Firestone & Rubber*  
 22 *Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). Moreover, even if it were, this Court  
 23 previously held that case law such as *Cooper* is not controlling over alleged substantial  
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25 <sup>1</sup> See Exhibit A, April 13, 2004 Glass email. Also, key messages used in interviews and  
 26 “distributed to BPV’s sales force, customers, physicians, employees, suppliers and others  
 27 as needed.” Doc. 16573-1, at 5. Q&As were used to “respond to questions from external  
 28 audiences” and hand “out to media, customers, physicians, suppliers, investors and other  
 Bard audiences.” Exhibit B, April 13, 2004 External Q&A at 1.

<sup>2</sup> Included were the head of marketing and the head of global sales. Exhibit C, May 4,  
 2004 Hudnall email.

1 similar incidents when, *inter alia*, the evidence Plaintiffs seek to introduce does not  
 2 involve an unrelated product failure. *See*, Doc. 10258, at 4<sup>3</sup>. In fact, fractures are the  
 3 exact negative scenarios described in the plan itself associated with the Recovery filter;  
 4 Bard admitted Recovery fractures were a reason for development of its G2 filter<sup>4</sup>. The  
 5 Crisis Communication Plan is relevant as it identifies an initial reported failure mode  
 6 associated with the same product, anticipation of future failures, Bard's testing of the  
 7 product, and a gestalt of behavioral reactions as "new details arise in this or other  
 8 incidents." If the "substantial similarity" test were to be applied, it can easily be met. *See*  
 9 *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986). The  
 10 "substantial similarity" rule is not so rigid as to exclude evidence of similar injuries  
 11 involving the same device. *See Walton v. Bridgestone/Firestone, Inc.*, 2009 WL 2778441,  
 12 at \*7 (D. Ariz. Jan. 16, 2009). Even adopting Bard's narrow scope of "similarity", the  
 13 evidence Bard seeks to exclude discusses strut migration,<sup>5</sup> which Mrs. Tinlin  
 14 experienced—including struts migrating to her heart and lungs. For this reason alone, this  
 15 evidence is relevant.

16 The Crisis Communication Plan and related evidence also supports Plaintiffs'  
 17 punitive damages claim as it is reflective of Bard's deliberate course of conduct in  
 18 reacting to its knowledge of the product's burgeoning failure history.<sup>6</sup> The frame of mind  
 19 of the alleged wrongdoer is a necessary consideration in determining whether punitive  
 20 damages may be imposed." *Sharp ex rel. Gordon v. Case Corp.*, 595 N.W.2d 380, 390  
 21 (Wis. 1999). Punitive damages require looking "to the frame of mind of the wrongdoer."

22 <sup>3</sup> Similar to this Court's ruling in Booker, Plaintiff's experts opine that she also suffers  
 23 from multiple failure modes: tilt, migration, and fracture with migration and perforation.

24 <sup>4</sup> "[O]ne of Bard's goals in developing the G2 Filter was to reduce the number of  
 incidents of filter fracture and migration that Bard had observed with the Recovery  
 Filter." Doc. 9862 at 4.

25 <sup>5</sup> *See, e.g.*, Exhibit D, Jan. 10, 2006 Crisis Communication Plan at 52 ("Other potential  
 26 causes of filter migration include improper implantation technique and fracture or failure  
 of the filter wires.").

27 <sup>6</sup> Punitive damages are permitted when the "defendant acted maliciously toward the  
 plaintiff or in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043.  
 28 Bard's actions are not limited to the hiring of the firm, rather its conduct in developing  
 the plan.

1 *Walter v. Cessna Aircraft Co.*, 358 N.W.2d 816, 819 (Wis. Ct. App. 1984). Here, the  
 2 Crisis Communication Plan and related evidence shows Bard's knowledge of risks and  
 3 frame of mind. Rather than take appropriate action, Bard publicly "downplayed" the  
 4 problem's extent and the plan gives the background of the conduct.<sup>7</sup> Such conduct  
 5 exemplifies the deliberate acts a jury could interpret as malicious or with intentional  
 6 disregard for potential harm. *See* Wis. Stat. § 895.043; Wis. JI-Civil 1707.2.

7 Bard also argues that because H&K helped create the Crisis Communication Plan,  
 8 it "is not specific to Bard" and thus "lacks probative value." *See* Def. Mtn. at 3. This is  
 9 incorrect. H&K created the template, Bard filled it with a core team to approve response  
 10 strategy, draft/review specific messaging, and dispense messaging to the media, sales  
 11 force, and public. Bard's team was actively involved in writing all content pertaining to  
 12 the Recovery filter and despite its reliance on case law addressing public relations firms  
 13 guiding corporate reaction, it has not shown that the Crisis Communication Plan is not  
 14 relevant or could not be interpreted by a jury as malicious or intentional conduct. Bard's  
 15 arguments appear to be ripe for cross examination rather than exclusion based on Rules  
 16 410, 402, and 403.

17 Also, Bard relies on a tenuous presentation of testimony from Holly Glass to  
 18 suggest it would suffer "unfair prejudice" because the Crisis Communication Plan was  
 19 "not finalized" or "never implemented."<sup>8</sup> Ms. Glass never suggested the Crisis  
 20 Communication Plan was never used, was unaware of later versions,<sup>9</sup> and could not say  
 21 which version Bard ultimately approved.<sup>10</sup> The extent the Crisis Communication Plan

22 <sup>7</sup> *See, e.g.*, Exhibit E, Apr. 15, 2004 Lehmann email.

23 <sup>8</sup> *See* Def. Mtn. at 2-3 n.4. Ms. Glass only testified that the October 2004 version of the  
 24 Crisis Communication Plan "was never implemented" because she remembered there  
 was a later version of the plan. *See* Doc. 16573-3 at 9-10 (Deposition of Holly Glass at  
 169:18-170:6).

25 <sup>9</sup> When asked about versions from late 2005 and early 2006, Ms. Glass responded, "I  
 26 haven't seen those" and stated she thought the dates were wrong because she did not  
 "remember this going on for years." Doc. 16573-3 at 10-11 (Deposition of Holly Glass at  
 170:21-171:11).

27 <sup>10</sup> When asked whether she had an independent recollection of whether the Plan was  
 approved and appears in Bard's corporate files, she responded "No."  
 28 Doc. 16573-3 at 13-14 (Deposition of Holly Glass at 173:24-174:7).

1 was “implemented” to the public is immaterial to its admissibility. It was formally  
2 approved reflecting Bard’s corporate process and conduct. Ultimately, it was so  
3 important to Bard’s strategy that Bard continued to amend it for two years<sup>11</sup>—long after  
4 Bard had stopped selling the Recovery filter. Bard also suggests that Plaintiffs would  
5 attempt to “sneak in” evidence of other incidents. For reasons stated above, this is not the  
6 case. Such evidence is admissible and Bard’s Motion to exclude the Crisis  
7 Communication Plan should be denied.

8  
9 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April 2019.

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12 By: /s/ Mark S. O’Connor

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28 <sup>11</sup> Bard employees continued to use and revise the Crisis Communication Plan at least through January 2006. *See*, Exhibit D., Jan. 10, 2006 Crisis Communication Plan.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of April 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine